A-736

(6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1390

THE REPUBLIC OF PARAGUAY and
JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States, and
JOSÉ MARÍA GONZALEZ AVILA, Consul General of the Republic of Paraguay to the United States,
Petitioners,

— v. —

JAMES S. GILMORE III, Governor of the Commonwealth of Virginia, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY IN SUPPORT OF APPLICATION FOR STAY OF OR INJUNCTION AGAINST EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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Dated: April 2, 1998

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To the Honorable William H. Rehnquist, Chief Justice of the United States and Circuit Justice for the Fourth Circuit, petitioners the Republic of Paraguay, Jorge J. Prieto, as Ambassador of the Republic of Paraguay to the United States, and José María Gonzales Avila, as Consul General of the Republic of Paraguay to the United States (collectively, "Paraguay"), respectfully submit this reply in further support of Paraguay's application for a stay of the execution of Paraguay's national, Angel Francisco Breard, now scheduled for April 14, 1998, or, in the alternative, an order enjoining respondent Virginia officials from carrying out the execution, pending resolution of Paraguay's petition for a writ of certiorari and, if the writ is granted, further order of this Court.

REASONS FOR GRANTING THE APPLICATION

The arguments advanced in Respondents'-Opposition, served April 1, 1998, are without merit. *First*, respondents err when they rely on *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973). *See* Opp'n at 4. In *Preiser*, this Court held that federal habeas corpus is the exclusive means by which a state prisoner could challenge the fact or duration of his confinement in federal court. *Id.* at 482-90. As respondents concede, however, "Paraguay and its officials are not, and never have been, parties to the case that resulted in the . . . state court criminal judgment against Breard," and they are not parties to Breard's habeas proceeding. Opp'n at 3. Because a petition for habeas corpus is not now and has never been a means by which Paraguay could have asserted its own rights, Paraguay, unlike the prisoners in *Preiser*, had no opportunity to choose between habeas and another remedy such as the *Ex parte Young* and section 1983 claims it asserts here. *Preiser* is therefore inapposite. *See* Paraguay

Br. (attached to Application, dated March 31, 1998, as Exhibit 4) at 25-26 n.5; Paraguay Reply Br. (attached to Application as Exhibit 7) at 7.

Second, respondents also err when they seek support from *Whitmore v. Arkansas*, 495 U.S. 149, 163-64 (1990), in which this Court set forth the showing a third party wishing to challenge a prisoner's conviction or sentence needs to make in order to establish standing as the prisoner's "next friend." *See* Opp'n at 4-7. From the outset of this action, Paraguay has made clear that it is asserting its own rights and only its own rights. *See* Application at 13-15; *see also Paraguay v. Allen*, 949 F. Supp. 1269, 1274 (Vienna Convention is self-executing and Paraguay has standing to assert its own rights thereunder), *aff'd on other grounds*, *Paraguay v. Allen*, 134 F.3d. 622 (4th Cir. 1998).[1] Hence, *Whitmore*, too, is inapposite.

Third, for the same reason, respondents also err when they rely on *Gomez v. United States District Court*, 503 U.S. 653 (1992), and *Lonchar v. Thomas*, 116 S. Ct. 1293 (1996). Those cases are inapposite where, as here, the federal plaintiff has not filed the civil action in order to avoid restrictions on successive habeas

1. *See also* S. Exec. Rep. No. 9, 91st Cong., 1st Sess. 5 (1969) (statement of Edward J. Lyerly, Deputy Legal Adviser, to Senate Foreign Relations Committee) ("[Vienna] Convention is considered entirely self-executive and does not require any implementing or complementing legislation"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 comment h (statements of executive branch in submitting treaty to Senate carry great weight in determining whether self-executing); *Blanco v. United States*, 775 F.2d 53, 60 (2d Cir. 1985) (Friendly, J.) ("The provisions of [friendship, commerce and consular rights] treaties are self-executing."); RESTATEMENT § 111 reporter's note 5 (collecting cases).

petitions. *See* Application at 13-15 (anticipating and addressing respondents' argument based on *Gomez* and *Lonchar*).

Fourth, there is no basis for respondents' assertion that granting the application here will somehow open the gates to a flood of similar actions by foreign sovereigns. Opp'n at 7-8. The reluctance of one sovereign to resort to the courts of another is well documented. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters' note 4 at 52 (1987) ("foreign governments and officials are generally reluctant to resort to national courts of other states to vindicate rights under international law"). There is no reason to believe that a decision giving effect to federal law in the form of two treaties will alter a dynamic that has existed for centuries. In any event, if Paraguay has a right under treaties with which the United States has agreed to abide, and chooses to vindicate that right by filing suit in a court in the United States, the court should not shy away from hearing the case simply because Paraguay might succeed in demonstrating a right to the relief it seeks. And respondents' attempt to characterize the action filed by Paraguay in September 1996 as a last-minute tactic to delay Breard's execution in April 1998 is fanciful. Opp'n at 8.

Finally, there is no basis for respondents' suggestion that the Court will not grant the writ because there is no split among the Courts of Appeals. Opp'n at 8-10. As an initial matter, Paraguay demonstrated in its Petition that there *is* a split on

the requirements that an *Ex parte Young* plaintiff must meet in order to gain protection from the continuing consequences of a completed harm. Petition at 16-21. But even in the absence of such a conflict, this Court frequently grants the writ in order to address "an important question of federal law that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c) -- particularly in cases, such as this one, with significant international aspects. *See, e.g., Argentine Republic v. Amerada Hess*, 488 U.S. 428 (1989) (reversing interpretation of Foreign Sovereign Immunities Act by circuit court not advanced or contradicted by any other circuit); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 & nn.25-30 (1985) (reversing decision on international commercial arbitration that accorded with unanimous view of the five circuits to consider the question). Finally, because this action both falls within the original jurisdiction of this Court and could give rise to significant international legal ramifications, the case would warrant a grant even if the Vienna Convention and *Ex parte Young* issues did not independently warrant one -- though they do. Petition at 22-29.

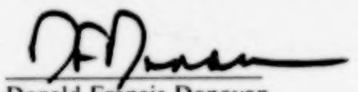
CONCLUSION

For the foregoing reasons and for the reasons set forth in the Application, Paraguay respectfully requests that this Court grant (a) a stay of execution

of Paraguay's national, Angel Francisco Breard, now scheduled for April 14, 1998, pending resolution of Paraguay's petition for a writ of certiorari and, if the writ is granted, further order of the Court, or (b) in the alternative, an order temporarily enjoining respondent Virginia officials from carrying out the execution subject to the same terms.

Dated: April 2, 1998

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Donald Francis Donovan, Counsel of Record for Petitioners the Republic of Paraguay, Ambassador Jorge J. Prieto and Consul General José María Gonzalez Avila, hereby certify under penalty of perjury that all parties required to be served with the petition for certiorari by the Rules of the Supreme Court of the United States have been served. On April 2, 1998, I caused a copy of the Reply in Support of Application for Stay of or Injunction Against Execution Pending Disposition of Petition for Writ of Certiorari to be served by Express Mail of the United States Postal Service upon each of the following:

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

Supreme Court, U.S.
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OFFICE OF THE CLERK

THE REPUBLIC OF PARAGUAY, et al.,

Applicants

v.

JAMES S. GILMORE, III, GOVERNOR OF VIRGINIA, et al.,

Respondents

On Application for a Stay of the Execution of Angel Breard

RESPONDENTS' OPPOSITION

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QUESTION PRESENTED

May this Court stay the execution of a State prisoner, ***not*** in the context of the prisoner's ongoing collateral proceedings under 28 U.S.C. § 2254, but at the request of a third-party foreign nation and its officials who have filed a civil suit under 42 U.S.C. § 1983?

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STATEMENT OF THE CASE

On September 12, 1996, the applicants filed a civil suit under 28 U.S.C. § 1131 and 42 U.S.C. § 1983 in the same federal district court where death-row inmate Angel Breard's habeas corpus petition was pending.[1] Paraguay and its two officials asked the district court to declare that all the named defendants – from the Governor of Virginia to the Chief of Police of Arlington County – had violated, not only the Vienna Convention, but also the Friendship, Commerce and Navigation ("FCN") Treaty of 1859. According to the suit, both Breard's capital murder conviction and death sentence were unconstitutional because, at the time of his arrest, the local Virginia authorities in Arlington County failed to advise him that, pursuant to the Vienna Convention on Consular Relations ("Vienna Convention"), he had the right to contact the Paraguayan consulate.[2] From the outset of the litigation, the applicants consistently have made clear ***that the only possible remedy for the alleged violations was for the federal courts to declare Breard's capital murder conviction and death sentence void and to enjoin the respondents from taking any steps to carry out the sentence***.

On November 27, 1996, the district court determined that it did not have jurisdiction to grant the extraordinary relief requested by the applicants. Paraguay v. Allen, 949 F. Supp. 1269 (E.D. Va. 1996).[3] Paraguay appealed to the Fourth Circuit. The Court of Appeals, however, affirmed on January 22, 1998. The Fourth Circuit held that the district court was correct in ruling that Paraguay's suit against the State of Virginia was barred by the Eleventh Amendment. Republic of Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998).[4] Paraguay did not file a rehearing petition.

Paraguay filed its certiorari petition in this Court on February 24, 1998. (No. 97-1390).[5] On February 25, 1998, the state trial court scheduled Breard's execution for April 14, 1998. After waiting nearly a month, Paraguay asked the Fourth Circuit to stay Breard's execution on March 24, 1998. On March 31, 1998, the Court of Appeals denied Paraguay's request. Paraguay now has asked this Court to stay Breard's execution pending resolution of Paraguay's certiorari petition.[6]

---

[1] Contrary to the assertion in its certiorari petition, Paraguay clearly was not "[f]aced with the approaching execution" of one of its nationals at the time it filed suit. (Ptn. 17). The district court had granted Breard a stay of execution, with the Commonwealth's agreement, on April 29, 1996 – more than four months before Paraguay filed suit. (Resp. App. 1).

[2] There is no evidence that the arresting authorities advised Breard that he could contact the consulate of Paraguay, nor is there any evidence that he sought to make such contact. It is undisputed, however, that the state trial court promptly appointed two experienced attorneys to represent Breard and that those attorneys were free to contact whomever they saw fit. There also is no evidence that the arresting authorities' failure to notify Breard of his right under the Vienna Convention was the result of anything other than ignorance or inadvertence.

[3] On that same date, the district court also dismissed Breard's habeas petition, after specifically finding that his "Vienna Convention" claim was barred from federal collateral review by his failure to raise it in state court. Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996). That judgment was affirmed on appeal. See Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998).

[4] Both the Fourth Circuit and the district court ruled that there was no "continuing violation" within the meaning of Ex Parte Young, 209 U.S. 123 (1908), ***because the undisputed facts showed that Paraguayan officials had enjoyed access to Breard since at least several months prior to the filing of Breard's federal habeas petition and, indeed, had assisted Breard in the preparation of that petition***. See Paraguay, 134 F.3d at 625, 628, affirming, 949 F. Supp. at 1273.

[5] Breard filed his certiorari petition in this Court on March 11, 1998. (No. 97-8214). The Commonwealth filed its brief in opposition on March 19.

[6] On March 23, 1998, Breard asked the Fourth Circuit to stay his execution. The Court of Appeals, however, denied the request on March 27. Breard asked this Court for a stay on March 30. The Commonwealth's previously-filed brief in opposition to Breard's certiorari petition anticipated and opposed such a stay motion. Breard's stay motion, as well as his certiorari petition, remains pending.

REASONS WHY A STAY OF EXECUTION SHOULD BE DENIED

1. The applicants have no standing to obtain a stay of Breard's execution.

Whether ***Angel Breard*** is entitled to a stay of execution is an issue that this Court undoubtedly will address in the certiorari proceeding he has pending in this Court. The answer to that question, however, must depend on the merits of ***Breard's*** case, ***not Paraguay's*** civil suit. The applicants clearly have no standing to seek or obtain a stay of Breard's execution. Under this Court's Rule 23.2, "[a] party to a judgment sought to be reviewed" may seek "to stay the enforcement ***of that judgment***." (Emphasis added). See also 28 U.S.C § 2101(f) (giving this Court authority to stay "such judgment or decree" that is subject to review by petition for certiorari). Paraguay and its officials certainly were parties to the Fourth Circuit's judgment in Paraguay v. Allen, but staying that judgment cannot operate to stay Breard's execution. Paraguay and its officials are not, and never have been, parties to the case that resulted in the presumptively valid state court criminal judgment against Breard that they now seek to stay. This Court's sole authority to stay Breard's execution is pursuant to § 2251,[7] and Paraguay clearly has no standing under that statute to seek a stay because neither it nor its officials are a party to Breard's ongoing § 2254 proceeding.

At the heart of Paraguay's lawsuit is its contention that, because of alleged violations of the Vienna Convention and the 1859 FCN Treaty, the federal courts should declare Breard's capital

[7] "A justice or judge of the United States before whom a habeas corpus proceeding is pending, may...stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding." 28 U.S.C. § 2251.

murder conviction "void" and enjoin Virginia from carrying out his death sentence. In Preiser v. Rodriguez, 411 U.S. 475 (1973), however, this Court held that claims challenging the validity of a state prisoner's conviction or sentence are not cognizable in a proceeding under § 1983 and that the ***sole federal remedy*** for such claims is a habeas corpus proceeding pursuant to 28 U.S.C. § 2254. See Preiser, 411 U.S. at 500; see also Heck v. Humphrey, 114 S.Ct. 2364, 2371 (1994) ("This Court has long expressed...concerns for finality and consistency and has generally declined to expand opportunities for collateral attack"); id. at 2372 (recognizing "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments").

Preiser's underlying rationale is that a contrary result would permit the circumvention of § 2254's "exhaustion" requirement, which mandates that claims challenging the validity of a state prisoner's conviction or sentence first be submitted to the state courts. See Preiser, 411 U.S. at 489-490 ("It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade [the exhaustion] requirement by the simple expedient of putting a different label on their pleadings"). The "exhaustion" requirement, of course, is based upon the weighty interests of federalism and comity, see id. at 491, which in turn require that federal habeas review of a state prisoner's conviction or sentence be regarded as "secondary and limited." See Barefoot v. Estelle, 463 U.S. 880, 887 (1983).

In Breard's federal habeas case, the two lower federal courts correctly have ruled that his "Vienna Convention" claim is barred by his procedural default in failing ever to have raised the claim in state court. See Breard, 134 F.3d at 619-620, affirming, 949 F. Supp. at 1263; see

generally Gray v. Netherland, 116 S.Ct. 2074, 2080-2081 (1996) (claims never raised in state court are barred from federal habeas review).[8] It thus is obvious that the applicants are attempting to obtain a stay of execution for Breard because his underlying habeas claim is barred and, as a matter of law, cannot support the granting of a stay. This Court clearly should not permit Paraguay to obtain for Breard what he cannot obtain in his own right.[9]

In Whitmore v. Arkansas, 495 U.S. 149 (1990), this Court held that a federal court has no jurisdiction to entertain a third-party suit which asserts the invalidity of a state prisoner's conviction or sentence, unless the third party demonstrates that the prisoner, by virtue of "inaccessibility, mental incompetence or other disability," is unable to litigate such claims himself. Id. at 163-164; see also Powers v. Ohio, 499 U.S. 400, 411 (1991) ("there must exist some hindrance to the [other] party's ability to protect his or her own interests"); Warth v. Seldin, 422 U.S. 490, 499 (1975) ("this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").

[8] Even if Breard's "Vienna Convention" claim were not procedurally defaulted, a federal habeas court could not grant relief upon such a claim without violating the "new rule" doctrine. See generally Caspari v. Bohlen, 510 U.S. 383, 390 (1994). No court ever has held that an alleged violation of the Vienna Convention may serve as a basis for overturning a State prisoner's conviction or sentence. If such a rule ever is created, it must be announced on direct appeal, not federal collateral review.

[9] Paraguay's present request for a stay of Breard's execution underscores the fact that, from the outset, the sole purpose of Paraguay's lawsuit has been to obtain habeas relief for Breard that he was barred from obtaining in a § 2254 proceeding. For instance, in its Fourth Circuit brief, Paraguay admitted that "the state court [criminal] judgment [against Breard] is the event which gives rise to [Paraguay's] claim." (Resp. App. 2-3). And, in the district court, Paraguay expressly stated that "vacatur of Breard's conviction and sentence is...the only way Paraguay can vindicate its own rights under the Treaties." (Resp. App. 4-5). Moreover, when specifically questioned by the district court, Paraguay stated unequivocally that vacating Breard's conviction and sentence was "the ***only*** appropriate relief." (Resp. App. 6-7, emphasis added).

Here, the applicants have not even alleged that Breard is unable to litigate the validity of his capital murder conviction and death sentence or to seek a stay of execution on his own behalf. To the contrary, Breard's pending federal habeas proceeding in this Court, where he is represented by a host of other attorneys and has raised substantially the same treaty claim that the applicants have raised, is irrefutable proof that Breard is able to litigate these issues himself. The fact that Breard's "Vienna Convention" claim is procedurally defaulted, and therefore has no chance of success, does nothing to confer standing upon the applicants.

2. A non-habeas civil suit may not be used to obtain a stay of execution that could not be obtained under the rules governing § 2254 proceedings.

In Gomez v. United States District Court, 503 U.S. 653 (1992), this Court made clear that a § 1983 suit cannot be employed to obtain a stay of execution that would be precluded under the rules governing successive federal habeas petitions. See Lonchar v. Thomas, 116 S.Ct. 1293, 1301 (1996) (interpreting Gomez to mean that the habeas rules "would apply, even if § 1983 [was] also a proper vehicle [for the] claim"); Felker v. Turpin, 101 F.3d 95, 96 (11th Cir.) ("Gomez held that a plaintiff cannot escape the rules regarding second or successive habeas petitions by simply filing a § 1983 claim"), cert. denied, 117 S.Ct. 451 (1996). Regardless of whether such a § 1983 suit is filed by the prisoner himself or by a third party, ***if the object of the suit is to obtain for the prisoner relief from his conviction or sentence to which he would not be entitled in a federal habeas proceeding, Gomez dictates that the attempted circumvention must fail***.

On numerous occasions during just the last year, this Court has denied stays of execution premised upon ongoing § 1983 litigation designed to evade the rules governing federal habeas

review under § 2254. See, e.g., Buchanan v. Gilmore, 118 S.Ct. ____, 1998 U.S. LEXIS 1782 (Mar. 18, 1998); Tucker v. Texas, 118 S.Ct. 906 (1998); In re Mu'Min, 118 S.Ct. 438 (1997) (in addition to denying stay, Court also denied "petition for writ to preserve [§ 1983] jurisdiction"); Perry v. Norris, 118 S.Ct. 15 (1997); O'Dell v. Allen, 118 S.Ct. 2 (1997) (denial of injunction); In re O'Dell, 118 S.Ct. 2 (1997) (denial of stay); McQueen v. Sapp, 117 S.Ct. 2536 (1997); Woratzeck v. Arizona Board of Clemency, 117 S.Ct. 2500 (1997). See also Griffin v. Missouri, 515 U.S. 1153 (1995); Poyner v. Murray, 507 U.S. 981 (1993).[10]

Even if Paraguay could speak for Breard - and it cannot - it clearly would not be entitled to a stay of Breard's execution under the stringent rules governing federal habeas proceedings. Gomez and its progeny require that this Court deny Paraguay's attempt to circumvent those rules by requesting a stay of Breard's execution, an extraordinary form of federal collateral relief to which neither Breard nor Paraguay is entitled.

3. Granting a stay of execution in this case would encourage a flood of third party civil suits designed to obtain relief for state death row prisoners.

It would be difficult to exaggerate the ruinous effect if this Court were to stay the execution of a State prisoner – who is not entitled to a stay in his own right – at the behest of a third party who has filed a civil suit which, by its own terms, would become moot or at least "prejudiced" if the prisoner is executed. As this Court is aware, death row inmates and their attorneys have fertile imaginations. But it takes no imagination at all to see that an unlimited number of contrived civil

[10] In Poyner, this Court denied a stay of execution and the prisoner was executed as scheduled on March 18, 1993. Significantly, this Court did not dispose of the certiorari petition in the § 1983 proceeding upon which the stay request had been premised until two months later. See Poyner v. Murray, 508 U.S. 931 (1993).

suits would be filed by those attempting to obtain relief for capital murderers who already have been denied relief in their own cases. Challenges under § 1983 to a State's method of execution, its executive clemency mechanism, or its compliance with a treaty are merely the most current examples; there undoubtedly would be others.

When a capital case has survived direct appeal and a full round of state and federal collateral proceedings, the "name of the game" from the perspective of the prisoner and his supporters is delay by any means possible. This Court's recent capital jurisprudence, however, as well as Congress' recent habeas reform, has been directed to ensuring that, once the case has reached this late stage, the opportunities for additional delay are eliminated or at least greatly minimized. Granting Paraguay's request for a stay of Breard's execution would represent a major step backward and, indeed, would foster the type of delay that engenders disrespect for our criminal justice system. See generally McCleskey v. Zant, 499 U.S. 467, 492 (1991) ("Perpetual disrespect for the finality of convictions disparages the entire criminal justice system").

4. There is no reasonable probability that certiorari will be granted in this case because there is no conflict among the courts of appeal regarding whether a foreign country may sue a State in federal court in order to invalidate a state prisoner's criminal conviction or sentence.

Even if Paraguay could overcome all of the foregoing obstacles to the granting of a stay, this Court still should deny Paraguay's request to stay Breard's execution. Under Barefoot, 463 U.S. at 880, this Court may not stay a State prisoner's execution unless there is a reasonable probability that four Justices would vote to grant certiorari ***in his case***, and there is a significant possibility the Court would reverse the decision of the court of appeals. See Netherland v. Tuggle, 116 S.Ct. 4, 5 (1995). Paraguay cannot possibly meet this stringent standard.

As previously demonstrated, both here and in the brief in opposition the Commonwealth has filed in Breard's case, there is ***no*** likelihood this Court will grant Breard's certiorari petition or reverse the Fourth Circuit's decision denying him federal habeas relief. But, even if the granting of a stay of Breard's execution could be made to turn on the likelihood the Court will grant ***Paraguay's*** certiorari petition, the result would be the same. The specific issue raised in Paraguay's certiorari petition is whether the federal courts have jurisdiction to entertain a civil suit brought by a foreign country and its officials against the officials of a State, ***where the sole object of the suit is the invalidation of a state prisoner's criminal conviction and sentence***.[11] On that issue, the only two federal appeals courts that have considered the matter have concurred that the question must be answered in the negative. See Paraguay, 134 F.3d at 627-629; United Mexican States v. Woods, 126 F.3d 1220, 1222-1224 (9th Cir. 1997).[12]

This Court, of course, grants certiorari "only for compelling reasons." U.S.Sup.Ct. Rule 10. Primary among such "compelling reasons" is the existence of a "conflict" between the decision of a court of appeals in the case where review is being sought and "the decision of another...court of appeals on the same important matter." Rule 10(a). Indeed, "[t]he occurrence of a conflict acts as a signaling device to help the Court identify important issues." Estreicher and Sexton, A Managerial

[11] Thus, any argument that denying certiorari would leave foreign countries with "no remedy" for an alleged treaty violation is an obvious overstatement. This case says nothing about federal jurisdiction generally, but only that there is no federal jurisdiction to entertain a lawsuit filed by a foreign nation against a State where the requested relief is the invalidation of a State prisoner's criminal conviction and/or sentence.

[12] Mexico filed its certiorari petition in the Woods case from Arizona on February 20, 1997. (No. 97-1365). While this Court has granted certiorari in the Arizona prisoner's federal habeas case, review was granted ***upon the State's petition*** and the issue there has absolutely nothing to do with an alleged treaty violation. See Stewart v. Martinez-Villareal, 118 S.Ct. 294 (1997) (granting review to determine whether "competency to be executed" claim may be raised in a successive federal habeas petition).

Theory of the Supreme Court's Responsibilities: An Empirical Study, 59 N.Y.U.L. Rev. 677, 719 (1984).

Here, the total absence of conflict among the courts of appeals, as well as the fact that only two circuits even have had occasion to consider the issue, should signal to the Court that it would be premature to grant review on the issue at hand. "'The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, has the benefit of the experience of those lower courts.'" California v. Carney, 471 U.S. 386, 400 n. 11 (1985) (Stevens, J., dissenting), quoting Estreicher & Sexton, 59 N.Y.U.L. Rev. at 719.

Given the lack of conflict among the courts of appeals, there is no reasonable probability that this Court will grant certiorari in Paraguay's case. Paraguay's pending certiorari petition, therefore, could not furnish the basis for a stay of Breard's execution even if Paraguay could overcome its clear lack of standing to request such relief.

5. There is no significant possibility that this Court would reverse the Fourth Circuit's decision.

The Fourth Circuit's decision undeniably is correct. The Eleventh Amendment clearly does not permit a foreign nation to sue a State in federal court. See Principality of Monaco v. Mississippi, 292 U.S. 318 (1934). A suit, the primary purpose of which is the setting aside of a State prisoner's criminal conviction or sentence is, in reality, a suit against the State, see Idaho v. Coeur d'Alene Tribe, 117 S.Ct. 2028, 2034 (1997) (Eleventh Amendment bars suit against state officials when State is the real, substantial party in interest), and the State's interests are at their apex when the validity of its criminal judgments are challenged collaterally in federal court. See generally McCleskey, 499 U.S. at 491-492. Moreover, the statutory habeas corpus remedy

embodied in § 2254 proceedings is "well-established" as the sole relevant exception to the State's Eleventh Amendment immunity. See Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1182 (1996) (Souter, J., dissenting); Paraguay, 134 F.3d at 627-628 n.6. Therefore, outside the limited context of federal collateral proceedings initiated by a State prisoner, the federal courts have no jurisdiction to entertain a suit, like Paraguay's, where the *sine qua non* is the overturning of the prisoner's capital murder conviction and death sentence. See Paraguay, 134 F.3d at 627-629; Woods, 126 F.3d at 1222-1224.

Even if the Fourth Circuit were wrong about the Eleventh Amendment, there ***still*** would be no significant possibility of reversal in this case. As the district court found, see Paraguay, 949 F. Supp. at 1273, the lower federal courts have no jurisdiction to conduct what is, in effect, a direct review of the State court criminal judgment against Breard. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-416 (1923).

Moreover, as both the Commonwealth ***and the United States*** argued in the Fourth Circuit,[13] the issues raised by Paraguay about alleged treaty violations and the remedies therefor, are essentially non-justiciable "political questions" which are beyond the jurisdiction of the federal courts. See generally Baker v. Carr, 369 U.S. 186, 211 (1962); see also Head Money Cases, 112 U.S. 580, 598 (1884) (a treaty "depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject

[13] The United States filed an amicus brief in the Fourth Circuit supporting the Commonwealth's position that the federal courts lack jurisdiction to entertain Paraguay's suit. The United States also presented its position during oral argument in the Court of Appeals on June 4, 1997. Finally, the United States communicated its position to Paraguay in a letter from the Department of State to the Ambassador of Paraguay dated July 7, 1997. (Resp. App. 8-10).

of international negotiations and reclamations...[but] with all this the judicial courts have nothing to do and can give no redress"); Foster v. Neilson, 27 U.S. 253, 314 (1829) ("when either of the parties [to a treaty] engages to perform a particular act, the treaty addresses itself to the political, not the judicial department").

Because there is no significant possibility that this Court would reverse the Fourth Circuit's conclusion that the federal courts lack jurisdiction to entertain Paraguay's suit, the pending certiorari petition cannot possibly serve as the basis for a stay of execution.[14]

CONCLUSION

Paraguay's motion for a stay of Angel Breard's execution should be denied.

Respectfully submitted,

JAMES S. GILMORE, III, GOVERNOR
OF VIRGINIA, et al.

By: _____
Donald R. Curry
Senior Assistant Attorney General

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[14] Under Barefoot, in addition to the "substantial probability" and "significant possibility" requirements, the party seeking a stay of execution also must demonstrate a "likelihood of irreparable harm." See Barefoot, 463 U.S. at 895. When the movant is a death row prisoner himself, this requirement usually is deemed satisfied. Paraguay, however, simply cannot demonstrate any likelihood of "irreparable harm" to itself or to its officials if Breard is executed while its certiorari petition remains pending, ***especially if Breard himself has asked for and been denied a stay***.

CERTIFICATE OF SERVICE

On April 1, 1998, a copy of the foregoing Opposition was mailed and faxed to Donald F. Donovan, Debevoise & Plimpton, 875 Third Avenue, New York, NY 10022, counsel for applicants.

Donald R. Curry
Senior Assistant Attorney General

RESPONDENTS' APPENDIX

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

FILED
APR 29 1996
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

ANGEL FRANCISCO BREARD,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR,

Respondent.

Civil Action No. 3:96cv366

ORDER

This matter is before the Court on the petitioner's motions to proceed in forma pauperis and for stay of execution. Upon due consideration and for good cause shown, it is hereby

ORDERED that the motion to proceed in forma pauperis is GRANTED; and it is further

ORDERED that the motion for a stay of execution is GRANTED.

It is so ORDERED.

Let the Clerk send a copy of this Order to counsel for the Respondent and to Donald R. Lee, Virginia Capital Representation Resource Center, PO Box 506, Richmond, VA 23204-0506.

APR 29 1996
DATE

Richard L. Williams
UNITED STATES DISTRICT COURT JUDGE

RECEIVED
APR 26 1995
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

2

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2770

THE REPUBLIC OF PARAGUAY; JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States; and JOSÉ ANTONIO DOS SANTOS, Consul General of the Republic of Paraguay to the United States,

Plaintiffs-Appellants,

— against —

GEORGE F. ALLEN, Governor of the Commonwealth of Virginia, *(additional parties listed inside cover)*

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PLAINTIFFS-APPELLANTS' BRIEF

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Attorneys for Plaintiffs-Appellants
(additional counsel listed inside cover)

Dated: March 4, 1997

Under no rationale can the state court judgment preclude Paraguay's claim here. The essence of Paraguay's claim is that it was deprived of its federally protected right to assist its citizen because it was never informed of the existence of the proceedings against him. By suggesting that the very proceeding from which Paraguay was unlawfully excluded could preclude Paraguay from asserting its right to assist in such proceedings, the District Court engaged in circular reasoning that finds no support in the authority on which it relied. The state court judgment is the event which gives rise to Paraguay's claim. It cannot at the same time pose a bar to that claim.

5.(...continued)
situation like this where it so clearly applies." 411 U.S. at 489.

Here, on its own terms, *Preiser* does not apply. The defendants never contended that Paraguay had a remedy under the federal habeas statute. Unlike the Court in *Preiser*, the District Court here was not called upon to decide between a general statute and a specific statute, either of which could provide complete relief on the facts pleaded. *See Preiser*, 411 U.S. at 488.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THE REPUBLIC OF PARAGUAY, et al.,	)	
	)	
Plaintiffs.	)	Civil Action No.
	)	
-against-	)	3:96CV745
	)	
GEORGE F. ALLEN, et al.,	)	
	)	
Defendants.	)	
	)	

OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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October 29, 1996

Paraguay is therefore not using this action as an impermissible appeal from an adverse state-court judgment. *Feldman* is inapposite.

Finally, *Whitmore* held that a third party cannot establish standing, as another person's "next friend," to challenge the validity of that person's conviction and sentence by either appeal or habeas unless, first, the "'next friend' . . . provide[s] an adequate explanation -- such as inaccessibility, mental incompetence, or other disability -- why the real party in interest cannot appear on his own behalf to prosecute the action" and, second, the "next friend" establishes that he is "truly dedicated to the best interests of the person on whose behalf he seeks to litigate." 495 U.S. at 163-64. Here, however, Paraguay does not seek to litigate on Breard's behalf: vacatur of Breard's conviction and sentence is instead the only way Paraguay can vindicate *its own rights* under the Treaties, and it is the real party in interest. *Whitmore*, too, is inapposite.

C. The Court Should Declare Paraguay's Rights Under The Treaties.

Defendants argue that the Court should exercise its discretion to refrain from entering a declaratory judgment with respect to the violation of Paraguay's rights under the Treaties. Def. Br. 23-24 (Part VIII); *see* Complaint ¶¶ A-E. Defendants' contention is without merit.

First, defendants' declaratory judgment argument is based on their erroneous contentions that *Preiser*, *Feldman*, and *Whitmore* require Paraguay's claims

the case law that fail --

THE COURT: Did you prosecute the case at the trial level?

MR. TRAMBLIAN: No, Your Honor. The Commonwealth's Attorney would do that. Our office, County Attorney's Office, would not be involved. But, if the failure of a police officer to Mirandize a suspect can't give rise to liability, I don't see how this is different. For all these reasons and for the reasons mentioned by Mr. Curry and our petition, we ask the motion be granted. Thank you.

THE COURT: Mr. Donovan.

MR. DONOVAN: Good morning, Your Honor. Your Honor, I would like to address the two principle arguments that it appears that the defendants are making. The first is that somehow this is an attempt to end-run the habeas proceeding, and secondly that somehow Paraguay is speaking artificially or hypertechnically when it describes what's happening here as an ongoing violation.

THE COURT: What relief could I give Paraguay that would be meaningful to it other than setting the conviction aside and awarding a new trial?

MR. DONOVAN: Well, we believe, Your

Honor, that that is, in fact, what the Court should order. The Court should order the vacatur of the conviction and sentence on the grounds that it was achieved only in violation of Paraguay's rights under the Vienna Convention and Friendship Treaty and that's the relief that we've requested in the complaint and we believe that's the only appropriate relief. We also asked for declaration for those rights. But we asked for a declaration that this conviction is void and injunction that's going forward that this defendant respect Paraguay's right with respect to the treaties.

THE COURT: Why is that the functional equivalency of habeas corpus which is personal to the individual who seeks his freedom?

MR. DONOVAN: It's not the functional equivalent because the basis of this suit -- and if I could step back a moment I will describe the basis on which Paraguay asserts its rights. But to answer the Court's question directly, the basis of this suit is Paraguay's rights under the Vienna Convention and Friendship Treaty. We are not here asserting a -- trying to end-run a habeas corpus proceeding as in Papasan(phonetic) case on which the defendants rely because Paraguay is not in custody and Paraguay

United States Department of State

Washington, D.C. 20520

JUL - 7 1997

Dear Ambassador Prieto:

I am responding on behalf of the Department of State to your letter to Ambassador Davidow of June 3, 1997, concerning the matter of Mr. Angel Breard. Your letter was received at the same time that my letter to you of the same date concerning this case was delivered to your representatives. Your letter reiterates your government's earlier request that the United States intercede on behalf of Mr. Breard. It also again expresses the view that the courts of the United States have authority to remedy any violation of the obligation of consular notification that occurred with respect to his detention and discusses the alternative possibility of these matters being considered by the International Court of Justice.

We have previously assured your government that the United States places the highest value on ensuring respect for the consular notification obligation under Article 36 of the Vienna Convention on Consular Relations ("VCCR"). We deeply regret if such notification was not provided to Mr. Breard. After learning that Mr. Breard may not have been advised of his right to consular assistance, the Department reminded officials of the State of Virginia of the need to advise all alien detainees of this right. We have now had extensive discussions with such officials about how consular notification and access should be implemented.

Since receiving your June 3 letter, the Department has also reviewed in more detail the facts of Mr. Breard's case, with a particular focus on the consular notification issues raised by your government and the claim that a consular officer could have dissuaded Mr. Breard from believing that that he should confess in open court to the February 17, 1992, murder of Ruth Dickie and claim to have been under a "Satanic curse" imposed by his father-in-law. Attached for your information is a summary of the facts as we understand them. (If there is additional information that you believe we have not considered, we would be pleased to receive it.)

Our review has been informed by our understanding of the consular notification obligation. A primary purpose of consular notification is to permit a state to offer its nationals in a foreign country the benefit of consular services and protection. The actual extent of consular assistance will depend on the country concerned, its consular practices, and its resources in the host country. Under no circumstances, however, can a consular officer in the United States act as an attorney for an alien. Moreover, when an alien is arrested, he is subject to the laws of the host state, and consular protection cannot immunize him from those laws, the judicial system established to enforce them, or the penalties imposed for their violation. A consular officer instead generally seeks to ensure that the alien has appropriate legal representation and that his legal rights are respected. The consular officer may also attend to the alien's needs while imprisoned, and may communicate with the alien's family and friends, if necessary. The actual need for and provision of consular services will generally be less in

The Honorable
Jorge G. Prieto,
Ambassador of Paraguay,
Washington.

situations where an alien is well represented by attorneys and in direct touch with family and friends – a situation most likely when the alien has been residing in the host country for a significant period. In some cases, an alien may decline consular notification, for privacy or other reasons, or because the alien does not consider consular assistance to be necessary.

While the obligation of consular notification is a serious one, in every country there are times when it is overlooked. U.S. diplomatic and consular officers raise issues of lack of consular notification with respect to U.S. nationals abroad, just as other countries' representatives raise similar concerns with the Department of State about aliens in the United States. Consular notification and access is a matter of continuous discussion between governments, which in our experience regularly review and if necessary enhance their efforts at compliance. Neither the VCCR text nor its negotiating record addresses how a failure to comply with the consular notification obligation must be remedied. We are aware of no state party to the VCCR that has a procedure for setting aside the results of its judicial process when there has been a failure to provide consular notification.

Having reviewed the facts in light of these considerations, we cannot accept that the lack of consular notification provides a basis for undoing Mr. Breard's conviction and sentence. It is entirely speculative, in any event, that a Paraguayan consul would have been intimately involved in Mr. Breard's trial and defense and would have convinced Mr. Breard to accept a plea bargain. Mr. Breard's attorneys were well positioned to advise him of the likely consequences of his confession in the State of Virginia, yet he would not accept their advice or the apparent advice of his mother to plead guilty. It is difficult to believe that a consular officer could have proven more persuasive.

Our review of these issues has reinforced our view that lawsuits between governments are not the appropriate means to enforce the consular notification obligation. We agree in particular with your assessment that this case is not one appropriate for resolution by the International Court of Justice. The reference to the VCCR Optional Protocol in our amicus brief was simply to illustrate that the state parties to the VCCR contemplated that issues under the VCCR would be addressed on a government-to-government basis, and certainly not by a government resorting to the domestic courts of another state party. We regret if that reference created any misunderstanding on this point. In any event, however, an ICJ proceeding is both costly and takes many years and extensive resources to pursue. It seems particularly inappropriate when there is no genuine dispute as to the requirements of consular notification and when the suggestion that consular notification in a particular case would have led to a different result is so speculative and implausible. Moreover, the ICJ would not have jurisdiction over Paraguay's asserted claims under the 1859 Treaty of Friendship, Commerce, and Navigation between the United States and Paraguay, which is not relevant to these issues in any event.

In closing, I reiterate that the Department of State remains available to consider other relevant information, including information about Mr. Breard's case and about consular notification practice by Paraguay and other countries. In addition, we would welcome the opportunity to discuss with Paraguayan consular officers the general question of consular notification and access and how our respective countries can improve implementation of this obligation.

Sincerely,

James Thessin

James H. Thessin
Deputy Legal Adviser

FACTS CONCERNING ANGEL BREARD

Mr. Breard is a dual Paraguayan-Argentinian national who came to the United States in 1986, originally as a student. He had been in the United States for roughly six years at the time he was arrested for Ruth Dickie's murder. He studied English when he first arrived here, and his command of English was sufficiently good that he acted as an interpreter in prison and did not require the assistance of an interpreter at trial. His trial attorneys have stated that they had no difficulty in communicating with him.

The State of Virginia cannot document that consular notification was given, but it is clear that Mr. Breard's family was quickly notified of his arrest and that others in Paraguay were also contacted. When he was first arrested, Mr. Breard asserted his right to an attorney and called his uncle. His mother testified on his behalf in the sentencing phase. In addition, Mr. Breard's attorneys have said that they were in touch with sources in Paraguay for information that might have assisted with his defense.

Mr. Breard's attorneys have also stated that they and his mother advised him to plead guilty. They have further stated that they advised Mr. Breard that his chances of being sentenced to death, rather than to life imprisonment, would be greater if he insisted on a trial and testified. As far as the courts have determined to date, Mr. Breard's attorneys were competent and he had the full panoply of due process protections guaranteed by the Constitution of the United States. These protections are among the most extensive provided by any state party to the VCCR.

Mr. Breard rejected the advice of his attorneys, refused to pursue a possible plea arrangement, and insisted on testifying at trial and at his sentencing hearing. The court was informed that Mr. Breard was testifying against the advice of counsel. He testified to the facts of the crime and claimed to have acted under a "Satanic curse" imposed by his father-in-law. During the sentencing phase, his testimony led to cross-examination that his trial attorneys have said had a negative effect on the jury.

Independently of Mr. Breard's testimony there was physical evidence that Mr. Breard attempted to rape and then brutally murdered Ruth Dickie on February 17, 1992. Blood, semen, and hair samples and DNA tests all pointed to Mr. Breard as the murderer. There was also evidence of significant aggravating factors to support imposition of the death penalty under Virginia law. The scene of the crime reflected the violence of Ruth Dickie's murder and the attempted rape that preceded it. Mr. Breard had attacked two other women, one before and one after Ruth Dickie's murder. Each attack was violent, and the second involved a sexual assault that was interrupted only because a neighbor called the police, who caught Mr. Breard with his victim. The arrest of Mr. Breard in the course of this assault led to Mr. Breard being charged with Ruth Dickie's murder.

It appears from these facts that Mr. Breard received the assistance that consular notification is designed to ensure. He had two attorneys and was in close touch with his family and others who might have helped him. Mr. Breard was a six-year U.S. resident who asked for an attorney when arrested; he apparently understood at least this basic tenet of the U.S. system reasonably well. In any event, however, he was clearly and repeatedly informed that it would not be to his benefit to plead not guilty and then to confess at trial.

BEST AVAILABLE COPY